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November 16, 2005

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 23, 2004

Case Number: TSO-0172

This Decision concerns the eligibility of XXXXX (the individual) to hold an access authorization¹ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's access authorization was suspended by the Manager of a Department of Energy (DOE) local office pursuant to the provisions of Part 710. Based on the record before me, I am of the opinion that the individual's access authorization should be restored.

I. Background

The individual is an employee of a contractor at a DOE facility. On December 19, 1985, the individual signed a DOE drug certification form, stating in pertinent part, "I agree that I will not buy, sell, accept as a gift, experiment with, traffic in, use or be involved with illegal drugs I understand that if I break this agreement even once, I may lose my DOE access authorization or security clearance." DOE Exhibit 9. On February 13, 2002, the individual completed a Questionnaire for National Security Positions (QNSP), in which he stated that he used methamphetamine one time in September 1993. The DOE local office conducted a Personnel Security Interview (PSI) with the individual on May 28, 2003. *See* DOE Exhibit 13. The DOE local office ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the DOE local office suspended the individual's access authorization, and proceeded to obtain authority to initiate an administrative review proceeding.

¹Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the DOE local office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, one of his co-workers, his supervisor, two friends of long standing, his wife, and his next-door neighbor.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization. I have also considered the evidence that mitigates that concern. And I conclude, based on the evidence before me and for the reasons explained below, that the security concern has been sufficiently resolved.

II. Analysis

A. The Basis for the DOE's Security Concern

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual "has trafficked in, or sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to Section 202 of the Controlled Substance Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.)" *See* 10 C.F.R. § 710.8(k). The Notification Letter also asserted that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of national security." *See* 10 C.F.R. § 710.8(l).² These statements were based on the individual's one-time use of methamphetamine in 1993 after signing a DOE drug certification in 1985.

² Unfortunately, the copy of the Notification Letter sent to the individual, as well as the copy originally sent to me, was missing the page that cited 10 C.F.R. § 710.8(l). I discussed this with the parties during a pre-hearing conference, and told the attorney for the individual that I would be open to an argument to postpone the hearing, given the lack of actual notice as to the security concerns raised under 10 C.F.R. § 710.8(l). The attorney stated that he felt we should proceed to a hearing, noting that he had prepared the case in anticipation of the individual's honesty, reliability, and trustworthiness being a central issue. Record of Telephone Conversation (February 8, 2005) (pre-hearing conference with DOE counsel and attorney for individual).

Several concerns are raised by evidence that an individual has engaged in trafficking, selling, transferring, possessing, using or experimenting with illegal substances. First, any involvement with illegal drugs demonstrates a disregard for the law. In addition, an individual who uses illegal drugs opens himself to blackmail or other forms of coercion, because he may want to conceal his usage. Moreover, even if the individual is only an occasional user, while the individual is under the influence of drugs, his judgment may be impaired and he may be more susceptible to pressure, coercion, or exploitation. The use of illegal drugs after signing a DOE drug certification raises additional concerns as to the future reliability of an individual, given that the individual has violated a commitment to the DOE.

I find that the undisputed facts in this case create a substantial doubt regarding the individual's eligibility for access authorization. Thus, the remainder of this decision will focus on whether the security concerns at issue have been resolved. I conclude that they have been resolved.

B. Whether the Security Concerns Have Been Resolved

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). Under the Part 710 regulations, the Hearing Officer is directed to make a predictive assessment as to whether restoring access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

"In resolving a question concerning an individual's eligibility for access authorization," I must consider

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

10 C.F.R. § 710.7(c). The discussion below reflects my application of these factors to the evidence presented in this case.

As noted above, there was some confusion regarding the security concerns being cited by DOE in suspending the individual's access authorization. *See supra* note 2. I find this not to be of major import, given that all of the security concerns in this case stem from one incident, the individual's use of methamphetamine in September 1993. Moreover, whatever the concerns raised by this incident, they have been more than sufficiently resolved.

There are two plausible concerns raised by the individual's use of an illegal drug in 1993. The first is that the individual may again use illegal drugs. As noted above, the use of drugs can impair a clearance holder's judgment, and a person wanting to conceal the use of illegal drugs is susceptible to blackmail or other forms of coercion. Second, whether or not he were to use illegal drugs, there is a concern that the individual cannot be counted on in the future to follow the rules governing the handling of classified information or special nuclear material, given that he broke the law in the past by using an illegal drug, as well as violated the commitment made to DOE when he signed a drug certification in 1985.

However, I find there is evidence that sufficiently mitigates both of these concerns. First, the individual's one-time use of methamphetamine occurred over 12 years ago. Thus, the concerns raised by this incident have been substantially mitigated by the passage of time. Moreover, the evidence indicates that this isolated incident was not indicative of his general behavior or character, either then or now.³

In my opinion, the probability that the individual will use illegal drugs in the future is extremely low. A close friend of over 25 years testified that he has never witnessed the individual using illegal drugs. Transcript of Personnel Security Hearing (hereinafter "Tr.") at 22-23. The individual's wife testified that drugs would never be allowed in their house and that the individual is "continually reminding" her son about the dangers of drugs. Tr. at 30. Another friend of over 25 years, who was present on the occasion in 1993 when the individual used methamphetamine, testified that drugs were not part of the individual's life before or after the incident. Tr. at 38-39.

In addition, the day after the individual's one-time methamphetamine use, the individual suffered a heart attack which, according to what his doctor told him, was caused by his use of the drug. The medical expenses incurred as a result of the heart attack contributed to financial difficulties that ultimately led the individual to file for bankruptcy.⁴ It is clear that the very negative experience that resulted from this incident is one of the reasons that the individual has not since used illicit drugs. As the individual bluntly put it at the hearing, "I don't want to die." Tr. at 58-59.

Another consideration is the individual's testimony that stress was a factor in his 1993 use of methamphetamine. Tr. at 57. While this may help explain this incident, it also raises the question of how the individual will handle stressful situations in the future, and whether using drugs might be a response. However, as was pointed out at the hearing, aside from what one can assume are typical stressors in anyone's life, the individual's wife of nearly four years suffers from multiple sclerosis and is unemployed, while the individual continues to meet support obligations to a child from a previous

³ This conclusion is supported by the report of a DOE consultant psychiatrist. In finding that the individual was "psychiatrically cleared for security purposes," the report concluded, "His unfortunate use of an illicit substance in the distant past, which could have resulted in his demise, seems to be an isolated event, and one from which he has evidently learned an important lesson in life." DOE Exhibit 6.

⁴ The Notification Letter identified no security concern related to the individual's bankruptcy filing, or his financial responsibility generally. DOE Exhibit 8.

relationship. Tr. at 59-60. Thus, in the 12 years since the incident, the individual has amply demonstrated his ability to weather stress without resorting to drug use.

As for whether the individual can be trusted in the future to honor his commitments and follow the rules, I see no evidence in the present case that the individual's disregard for drug laws in 1993 was indicative of a pattern in the individual's life of disregard for other laws, for the law in general, or in particular for any laws relating to national security. A co-worker who has known the individual for 20 years describes him as "very trustworthy and reliable," and "very dependable," someone who recognizes he made a mistake in the past, and is now "more cautious" as a result. Tr. at 12, 13, 18. His long-time friends who testified concurred, one rating his honesty, reliability, and trustworthiness as "impeccable," the other describing the individual as "a good guy, trustworthy, I'd trust him with my life." Tr. at 20, 35. His supervisor testified that the individual's judgment was usually "very good," that he is "reliable every day," and that "he's as trustworthy as anybody I've worked with." Tr. at 48-50.

Though such testimony might not be surprising coming from witnesses called by an individual at a DOE security clearance hearing, it is bolstered by one extraordinary fact: The individual voluntarily reported his 1993 methamphetamine use to the DOE. The QNSP the individual completed in 2002 asked whether, "[s]ince the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, . . . ?" DOE Exhibit 10. The individual marked "Yes" and elaborated by giving the date (September 1993) of his methamphetamine use, indicating that it was a one-time use. *Id.* Obviously, the individual was under no obligation to report any drug use prior to 1995 in response to this question, but he did anyway. This clearly supports a conclusion that the individual is honest and scrupulous beyond DOE's requirements, and indicates that he had nothing to hide concerning any more recent use of, or future intent to use, illegal drugs. Considering all of the above, I have no doubt that the individual can be trusted to follow DOE security regulations in the future, despite his past use of an illegal drug and his violation of the commitment in his 1985 drug certification.

III. Conclusion

Upon consideration of the record in this case, I find that there is evidence that raises a substantial doubt regarding the individual's eligibility for a security clearance, specifically the individual's one-time use of an illegal drug in 1993. However, the concern raised by that incident has been sufficiently mitigated by the individual's sustained abstinence from the use of any illegal drug for 12 years, as well as his demonstration of honest and reliable behavior in the same time period, most notably his reporting of his 1993 drug use to the DOE when he was under no obligation to do so.⁵ For the above-stated reasons, "after consideration of all the relevant information, favorable and unfavorable," I conclude that restoring

⁵ It is worth noting here the DOE counsel's opinion, expressed at the hearing, in favorably distinguishing the present case from another cited by the individual's attorney. Tr. at 66 ("[The individual]'s case is even more strong, I think, as far as these DOE [drug] certification cases, which I think are difficult to overcome. . . . I think [the individual]'s case is different in the respects of his heart attack and bankruptcy, which based on his testimony and testimony of witnesses, I think [the individual]'s paid dearly, and as such has learned from that mistake." Tr. at 66.

the individual’s “access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. §§ 710.7(a), 710.27(a).

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: November 16, 2005